



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** Varian Associates, Inc.--Request for  
Reconsideration  
**File:** B-229921.6  
**Date:** September 27, 1988

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### **DIGEST**

Request for reconsideration is denied where there is no showing that prior decision may have been based on factual or legal errors; allegations that agency acted improperly when responding to the bid protest are irrelevant to the propriety of the award, the issue considered by the General Accounting Office.

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### **DECISION**

Varian Associates, Inc., requests reconsideration of our decision Litton Systems, Inc., et al., B-229921, et al., May 10, 1988, 88-1 CPD ¶ 448, wherein we denied Varian's protest against the award of a contract to ITT Corporation for night vision systems, under request for proposals No. DAAB07-87-R-F039, issued by the Army. We deny the request.

In its initial protest, Varian alleged that making award to ITT for the entire requirement was inconsistent with preserving effective, long-term competition, and could only have resulted from the agency's failure to consider the delays under ITT's prior contracts, or to evaluate past performance as required by the solicitation. As we noted in our prior decision, however, the solicitation provided for division of the requirement between two contractors only in the event that two competitive best value offers were received and the government was not completely satisfied that one offeror could meet the required delivery schedule. Our review of the record established that the Source Selection Evaluation Board (SSEB), a preaward survey (PAS) team, and another independent evaluation team (the Red Team), all took ITT's past performance into account, and that the contracting officer made award to ITT on the basis of his determination that ITT could supply 100 percent of the requirement.

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In its request for reconsideration, Varian questions whether the agency evaluated ITT's prior performance for purposes other than a determination of responsibility. In this regard, it points out that a cover letter to the Army's administrative report responding to the protests denied that there was a past performance evaluation factor and stated that the evaluators had not rated the past performance of any of the offerors.

As stated above, we specifically found in our prior decision that "the SSEB, the Red Team, and the PAS team all took past performance into account," and that the evaluation documents indicated that past performance was considered in the evaluation of ITT's production capability, an evaluation subcriterion. In addition, affidavits filed with our Office by both the chief evaluator for the production capability and program management factor and the product manager for night vision devices, declared that offerors' past performance was discussed and considered at length. We therefore determined that, the statement in the cover letter notwithstanding, the substantive record demonstrated that the Army did evaluate ITT's production capability as required by the solicitation.

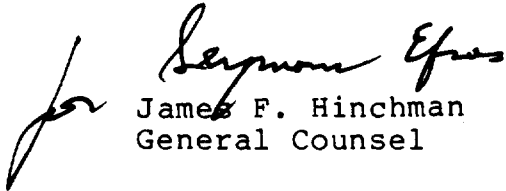
Varian next contends that the Army acted improperly in responding to the protest, by seeking ITT's assistance in drafting the protest report, editing the draft contracting officer's statement to conceal relevant information, withholding documents from the protester on the basis of allegedly spurious claims of privilege, and releasing to ITT a copy of the administrative report that included information concerning other offerors' production capabilities.

These allegations do not provide a basis for reconsideration since, while related to the development of the record, they do not purport to establish that our decision itself was erroneous, i.e., that we incorrectly concluded that the evaluation and the award to ITT were proper. In any case, we find no material editorial changes to documentation furnished by the Army. As for the Army's claim of privilege barring the release of some documents to Varian, we point out that the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(f) (Supp. IV 1986), does not require government agencies to furnish to protesters documents that could give one or more parties a competitive advantage, [which was one of the arguments presented by the agency for not disclosing the documents. We fully considered the competing interests with respect to disclosure; this ultimately resulted in the disclosure of some documents initially withheld by the agency. 4 C.F.R. § 21.3(c)-(f) (1988). We found no basis for concluding that the Army's

claim of privilege with respect to the withheld documents was spurious.] Moreover, our decision was based on the entire record, not merely those portions that were provided to the protester.

Varian also questions our handling of its protest. In the course of considering the protest, we requested the Army to provide a supplemental report responding to the protester's comments on the initial administrative report, and addressing specified aspects of the evaluation of proposals. Varian alleges that we considered the supplemental report without allowing Varian an opportunity to comment on it. Varian's allegation is unfounded. Except for certain attachments withheld from the parties by the Army under a claim of privilege, Varian was provided with a complete copy of the agency's March 14 supplemental report, which included a recitation of the areas of concern raised by our Office. Indeed, in a letter dated March 28, Varian expressly acknowledged that it was commenting on the supplemental report.

The request for reconsideration is denied.

 James F. Hinchman  
General Counsel